United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF OF APPELLANT

273

In The

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 17,182

ROBERT CUNNINGHAM, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

Martin F. O'Donoghue
Counsel for Appellant
Appointed by the Court
1912 Sunderland Place, N. W.
Washington 6, D. C.

STATEMENT OF QUESTIONS PRESENTED

I. Whether the Trial Judge during his cross-examination of Defendant, Thomas Flurry, by his questions and remarks in the presence of the jury, so belittled the defense of the Appellant, as to convey to the jury his believe in the probable guilt of the Appellant, thereby denying to him the right to make a defense - his constitutional right to a trial by jury.

II Whether a comment by the Trial Judge during his charge, to the effect that there was no reason why the Government's case (the testimony of two police officers) should not be believed, and that their testimony was sufficient to prove the guilt of the Appellant beyond a reasonable doubt,was a conveyance by the Trial Judge of his belief in the probable guilt of the Appellant; and, if so, is this such an exceptional criminal case where a Trial Judge may give to the jury his opinion of the guilt or innocence of an accused.

III. Was the charge of the Trial Judge so argumentative and one-sided that, when taken together with his questions and remarks, made during the trial-in-chief, they constitute prejudicial error.

JURISDICTIONAL STATEMENT

This Court has jurisdiction of this appeal pursuant to Rule 37 of the Federal Rules of Criminal Procedure since this is an appeal timely filed from a judgment and sentence in the United States District Court for the District of Columbia; and further pursuant to an order of this Court entered in this cause on June 14, 1962, allowing Appellant to proceed on appeal without prepayment of costs.

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UNITED STATES COURT OF APPEALS
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	)	
v.	)	Case No. 17,182
	)	
UNITED STATES OF AMERICA,	)	
	)	
Appellee	)	

BRIEF OF APPELLANT

STATEMENT OF FACTS

Appellant, Robert Cunningham, and Co-Defendant, Thomas Flurry, were convicted on January 4, 1962, in a trial by jury on the charge of housebreaking in that, on or about August 18, 1961, within the District of Columbia, Robert Cunningham and Thomas Flurry entered the store of Robert C. Peters with intent to steal property of another. Appellant received a sentence of twenty months to five years.

At the trial, which commenced January 2, 1962, the prosecution stated, through the evidence of a police officers, that the Appellant, Robert Cunningham, along with Co-Defendant Thomas Flurry, broke into an appliance store located at 6200 Third Street, Northwest. That the Appellant, Robert Cunningham, was caught in the store by a policeman at 3:00 A.M. Co-Defendant Thomas Flurry was arrested a block away, hiding in some bushes.

Appellant, Robert Cunningham, denied being in the store, and offered the defense that both he and Flurry were in the alley

behind the store so that he might relieve himself. Both Defendants further testified that they were at the time on the way to the home of Vernon Nelson, a friend of theirs, who had invited them over since he had just got off work. Nelson's home was nearby at 515 Sheridan Street, Northwest. Both admitted being in the alley at the time and Cunningham denied incriminating oral statements which a policeman attributed to him. Both Defendants took the stand and offered the foregoing defense. Their testimony was not shaken by cross-examination as to why they were in the alley or where they were going. The following testimony and remarks of the Trial Judge were elicited when the Trial Judge cross-examined Defendant Flurry. They are partially the basis for Appellant's appeal:

> The Court: "How is it or why is it that you and Cunningham were out on the streets at three o'clock in the morning?
>
> Defendant Flurry: "Well, Your Honor, I was going to see Vernon Nelson.
>
> The Court: "At three o'clock in the morning?
>
> Defendant Flurry: "Well sir, he gets off from work at - -
>
> The Court: "Well, you could see him before he goes to work, couldn't you?
>
> Defendant Flurry: "Yes, sir.
>
> The Court: "You ought to have been in bed. Honest people are in bed at three o'clock in the morning."

Subsequently, the attorney for Thomas Flurry objected to the last remark of the Trial Judge and requested that he withdraw it. His request was summarily denied. At that time, the following colloquy between Counsel for the defense, the Trial Judge, and the Prosecutor occurred:

> Mr. Burke: "Your Honor, with humble apologies to Your Honor, but Your Honor made the statement, while Mr. Flurry was on the stand, that honest people are in bed at this hour.
>
> The Court: "I did.
>
> Mr. Burke: "And I wonder if Your Honor will ask the jury to disregard that.
>
> The Court: "No, I never ask the jury to disregard my statements.
>
> Mr. Burke: "Wouldn't that be prejudicial against this witness? Wouldn't that be prejudicial against this witness?
>
> The Court: "The circumstance is prejudicial, not my statement.
>
> Mr. Smith: "I'm sorry. I didn't hear His Honor say honest - -
>
> The Court: "I said that honest people are in bed at three o'clock in the morning. I said that.
>
> Mr. Smith: "I didn't hear that, Your Honor.
>
> Mr. Burke: "Well, Your Honor, just to protect myself, I move at this time for a mistrial.
>
> The Court: "You may note an objection to my remark. That is entirely proper, it is lawyer-like." (Jt. App.).

The following day, January 4, prior to instructions to

the jury, the attorney for Appellant Robert Cunningham also excepted to the remarks of the Trial Judge, which exception was noted.[1/] At this time also, the Government, apparently realizing the untenable position in which the Trial Judge had placed himself, requested that the Judge give the following instructions to the jury so that the prejudicial effect of the remark of the Judge might be removed and the issue as to the truth or falsity of the Appellant's defense might be left in the hands of the jury and the Judge's opinion might not be forced on them as a result of his remarks. The proposed instructions offered by the Government are set out at length:

> "Ladies and gentlemen of the jury, as you may already know, it is the function of the Court, that is, it is my function and my duty, to instruct the jury as to the rules of law that must govern the disposition of the case on trial. You, ladies and gentlemen of the jury are bound and obligated to take the law from the Court and to follow the Court's instructions as to the law. On the other hand, the jury decides the facts. You, ladies and gentlemen of the jury are the sole judges of the facts and you must determine the facts yourselves on the basis of the evidence and solely on the basis of the evidence introduced at this trial." (Jt. App.).

1/ Mr. O'Hara: "One other thing, Your Honor. Yesterday Mr. Burke objected to the Court's questioning of the witness Flurry with regard to a person of that age being out at three a.m. in the morning. After consideration, I think that the Court's comments would also be prejudicial towards Cunningham and may I go on record as objecting with regard to Cunningham. Thank you.

The Court: "Of course, the Court's comment was really a fact of life because honest people, except those who do night work like a policeman, don't stay out at three o'clock in the morning, unless on a night like New Years Eve or something of that sort. (Jt. App.).

"Now, if perchance, during the course of this trial, the Court made any statement about the case or the testimony of any witness, you are not to regard this statement as an expression by the Court of the guilt or innocence of either defendant. Nor are you to regard such a statement as an expression by the Court as to the credibility of any witness.

"It is not within the province of the Court to determine the guilt or innocence of the defendants. Nor is it within the province of the Court to judge the credibility of the witnesses.

"These are matters which you the jury must determine. Therefore, in deciding the issues in this case, you are instructed to disregard any statements the Court may have made during the course of the trial." (Emphasis supplied)

This request was summarily denied with the following colloquy:

Mr. Smith: "Your Honor, I wonder if I could submit a requested instruction which I have served.

The Court: "Yes, you may do so. Have you given a copy to the other side?

Mr. Smith: "Yes, Your Honor, to both attorneys.

(Brief pause)

The Court: "No, I am going to deny that because the Court has a right to express its opinion as to guilt or innocence.

Mr. Smith: "I wondered if Your Honor would charge the jury that this is not binding upon them.

The Court: "I always do that. I appreciate the care that you have taken in preparing this, but it is really unnecessary labor.

Mr. Smith: "Thank you, Your Honor.

Mr. Smith: "Your Honor, may I file my written request in the record?

The Court: "You may, of course.

Mr. Smith: "Thank you."

The Trial Judge, in his instructions, which are attached to this brief, then made the following statement:

> "Now, at this point I want to say that if you accept the testimony of the officers -- and there is no reason why you should not, they appeared to me to be perfectly disinterested; but it is for you to say, of course -- the officers' testimony is sufficient, if you accept it, to constitute, without anything further, proof beyond a reasonable doubt of the defendants' guilt."

To this and other instructions, counsel for Appellant excepted.

See Joint Appendix _____.

STATEMENT OF POINTS AND SUMMARY OF ARGUMENT[1/]

1. The Trial Judge's cross-examination of Defendant Flurry and remarks made by him regarding the defense of Defendant Flurry and Appellant Cunningham were erroneous and require reversal.

2. The Trial Judge's instructions contained an unqualified statement of his belief in the Defendants' guilt, which statement is erroneous and requires reversal.

1/ Counsel joins his statement and summary together since they are substantially the same, cover the matters required by Rule 17(d), and otherwise would be repetitious.

3. The Trial Judge's instructions, taken as a whole, were argumentative in that they were directed entirely toward a verdict of guilt and, hence, are erroneous and require reversal.

ARGUMENT

I. THE TRIAL JUDGE'S CROSS-EXAMINATION OF DEFENDANT FLURRY AND REMARKS MADE BY HIM REGARDING THE DEFENSE OF DEFENDANT FLURRY AND APPELLANT CUNNINGHAM WERE ERRONEOUS AND REQUIRE REVERSAL.

A. The Remark of the Trial Judge Was An Unwarranted, Misleading and Erroneous Conclusion.

The testimony of both Appellant Cunningham and Co-Defendant Flurry was that they were walking to a friend's house at 3:00 in the morning and that they were in the alley because Robert Cunningham wished to relieve himself. The Judge asserted that anyone who is out at 3:00 in the morning is up to no good, implying criminal intent on the part of anyone who was doing so.[2/]

That the exercise of a citizen's right to walk the streets at any time can be conclusive evidence of, - and not merely a fact from which, under certain circumstances, a jury may draw an inference of criminal intent, is a misleading deduction and is completely unwarranted. Such a remark is plain error. See Quercia v. United States, 53 S. Ct. at 699, citing Star v. United States (1894), 153 U.S. 614; Blunt v. United States, 100 U. S. App. D.C. 276, 277.

2/ See Jt. App. p. _____

B. This Remark Withdrew From the Appellant the Right to Make His Own Defense, And, In Effect, Denied Him the Right To a Trial by Jury.

The Judge's remark in this case is nothing more than an assertion that all Defendant Flurry and Appellant had said on their own behalf was a lie.[3/] In no doing, the Trial Judge withdrew from the Defendants the right to make a defense.

In the instant case, the Trial Judge, by judicial fiat, rendered the defense offered by Defendant Flurry, which was the same as Appellant Cunningham's, as a lie. It "rendered vain by this hostile comment the privilege of the accused to testify in his own behalf." (Querica v. United States, supra, citing Hicks v. United States, 150 U.S. 442, 452; Allison v. United States, 160 U.S. 203, 207, 209, 210). In Hickory v. United States, 160 U.S. 408, 16 S.Ct. 327, 40 L.ed 474, a trial judge said: "No one who is conscious of innocence would resort to concealment." The Supreme Court regarded such a statement as tantamount to saying that all men who did so were necessarily guilty.

Here we have a completely analogous situation since the Judge, by saying that honest people are in bed at 3:00 in the morning, said, in effect, that all people walking the streets at 3:00 in the morning are necessarily guilty and up to no good since they are dishonest people.

It follows, then, that the Trial Judge's remarks in this

3/ See Quercia v. United States, supra, at 472.

case, when taken together with the previous question to the Defendant as to whether or not he could have seen Vernon Nelson before Nelson went to work instead of after, was nothing more than a belittling by the Trial Judge of this Defendant's and the Appellant's efforts to establish the reason for their presence in the alley on the morning in question, and could have conveyed nothing more to the jury than his strong belief in the Defendants' probable guilt. This remark withdrew from the jury its freedom to perform its common law, constitutional and statutory function, namely the independent determination of the facts. United States v. DeSisto, 289 F.2d 834, 835, citing United States v. Brandt, 196 F.2d 656.

C. The Trial Judge In This Case, By His Actions, Was Argumentative and An Advocate.

This point need not be argued at length. The words speak for themselves. Although a trial judge is to be more than a mere arbitrator, he cannot be argumentative in his comments; he cannot be an advocate, and he cannot urge his own view of the guilt or innocence of the accused. See Billeci v. United States, supra.

The Judge was nothing more than this in the instant case. Here he was not merely exercising his common law and statutory right to assist the jury in arriving at a just conclusion or attempting to elicit facts which might help them to perform their function as finders of fact but, rather, all of the facts, prior to the time when the Judge took on the cross-examination of

Defendant Flurry, were in the record. No new facts were elicited by the Trial Judge. Instead his cross-examination of Defendant Flurry regarding his reason for being in the alley was used to belittle the defense and to show its weakness; once done, he concluded with the afore-recited uncalled for and completely improper remark.

This certainly was not the act of a coldly neutral impartial judge. Rather, these were the questions and argument of a prosecutor - the Government - the advocate. His statement - that only persons with criminal intent are out at 3:00 in the morning was misleading and questionable even for the argument of a prosecutor, much less that of a disinterested and objective participant in the proceeding. Billeci v. United States, supra.

In conclusion, it invaded the historical demarcation, both constitutional and statutory, between the functions of the judge and the functions of the jury which long ago, in the words of Lord Hardwick, was presented thus:

> "It is the greatest consequence to the law of England and to the subjects (citizens) that the powers of the judge and the jury be kept distinct. That the judge determine the law and the jury the facts; and if ever they come to be confronted, it will prove the confusion and destruction of the law of England." R. v. Pool, Cas. Temp. Hardw. 28.

The Supreme Court long ago set out at length these separate functions of judge and jury in the case of Quercia v. United States, supra. Our Court of Appeals has adopted the reasoning of reasoning of the Supreme Court in our jurisdiction and outlined the

the powers and duties of a trial judge as follows:

> "A federal trial judge in a criminal case is not an inert figure. He is not a mere moderator. Besides his own exclusive functions of conducting the trial and declaring the applicable law, he may guide and assist the jury in its consideration of the evidence. The purpose of his comment is to aid, through his experience, the inexperienced laymen in the box in finding the truth in the confusing conflicts of contradictory evidence. In exceptional cases he may even express his opinion upon the evidence, or phases of it. But there is a constitutional line across which he cannot go. The accused has a right to a trial by the jury. That means that his guilt or innocence must be decided by twelve laymen and not by the one judge. A judge cannot impinge upon that right any more than he can destroy it. He cannot press upon the jury the weight of his influence any more than he can eliminate the jury altogether. It is for this reason that courts have held time and again that a trial judge cannot be argumentative in his comments; he cannot be an advocate; he cannot urge his own view of the guilt or innocence of the accused. . .
>
> * * * * *
>
> "The difference between assisting the jury, which is a duty of a federal judge, and encroaching upon its responsibilities, which is forbidden, has been developed at great length many times, as we have pointed out. When a federal judge comments upon evidence by expressing his opinion upon phases of it, he is treading close to the line which divides proper judicial action from the field which is exclusively the jury's. . ." (Billeci v. United States, 87 U.S. App. D.C. 274, at 283, 284).(Emphasis supplied)

Here the Trial Judge was argumentative and an advocate, and urged his belief of the guilt of the Defendants on the jury -"he crossed the line" and became the jury. Billeci, supra.

D. The Prejudice to Defendant Flurry By The Judge's Remark Is Completely Applicable To Appellant Cunningham.

This proposition follows from the fact that both

Defendants offered the same reason and purposes for their being out on the public streets and in the alley at 3:00 in the morning. Therefore, the Judge's remark to Flurry was equally applicable to Appellant Cunningham, whom he mentioned in the colloquy. Any prejudice which resulted to Flurry from that remark also applied to the Appellant who had previously testified.

E. The Trial Judge's Remarks and Cross Examination Cannot Be Cured By Subsequent Instructions.

We have previously submitted that the remark of the Trial Judge was a misstatement of fact; that it was a judicial determination by him that the defense raised by the Defendants, as their reason for being in the alley at that time of the morning, was a lie, and that, in his opinion, the Defendants were there for an unlawful purpose. We have further shown that the remark was, on its face, argumentative, partisan, and befitting a prosecutor and advocate. Under these circumstances, this incident may not be cured by a later instruction to the jury that it was their province to judge the credibility of the witnesses and the guilt or innocence of the Defendants. Under similar circumstances, our Circuit Court of Appeals in Blunt v. United States, supra, have held that it is an error that cannot be cured.[4/] Our Circuit has stated:

4/ It is to be noted that the Trial Judge refused to tell the jury to disregard his remark and nowhere in his instructions, although he outlines in detail the functions of the Trial Judge and the jury, (however, he stated that a trial judge may give his opinion as to the guilt or innocence of the accused) did he at any time state the jury was to disregard statements made by him during the trial. He stated only that they might disregard his comments on the evidence during instructions.

"What the judge did here took on the aspect of advocacy. Although he put a few questions to witnesses for the prosecution, his interrogations were largely confined to defense witnesses. The judge may, of course, properly participate in the examination of the witnesses for the purpose of elucidating their testimony in order to assist the jury. But, as was said in Blumberg v. United States, 5 Circ., 1955, 222 F.2d, 496, 501:

> '* * * it is far better for the trial judge to err on the side of abstention from intervention in the case rather than on the side of active participation in it, especially when the major part, if not all of his interruptions and interventions though by chance rather than by design, are, or seem to be, on, or tending to be on the side of the government.'

"See also Starr v. United States, supra, 153 U.S. at page 626, 14 S.Ct. at page 923. The constitutional guarantee of trial by jury limits the judge's role. ' * * * [he] cannot be argumentative in his comments; he cannot be an advocate; he cannot urge his own view of the guilt or innocence of the accused.' Billeci v. United States, 87 U.S. App. D.C. at page 283, 184 F. 2d at page 403. By the questions and instructions we have quoted, and by showing special favor to the prosecution in other ways as well, the judge exceeded these limits.

"The harm was not cured, as the Government suggests, by including in the charge the standard instruction that it was for the jury to find the facts and that they were not bound by his comments. 'His definite and concrete assertion[s] of fact, which he had made with all the persuasiveness of judicial utterance, * * * [were not withdrawn." Quercia v. United States, supra, 289 U.S. at page 472, 53 S.Ct. at page 700.5/

5/ The 2d Circuit in DeSisto, supra, stated that where in cross-examination a judge belittles defendants' attempt to establish defense, thereby conveying to the jury the impression of the Court's belief of the defendant's probable guilt, a jury cannot perform its own function of independent determination of the facts and hence it is not possible to remove the impression by instructions given in the charge.

II. THE TRIAL JUDGE'S INSTRUCTIONS CONTAINED AN UNQUALIFIED STATEMENT OF HIS BELIEF IN THE DEFENDANTS' GUILT, WHICH STATEMENT IS ERRONEOUS AND REQUIRES REVERSAL.

It is to be remembered that the Goverment's case was purely and simply the testimony of the two police officers. It was on their testimony that the Government relied. In his charge to the jury, the Judge stated:

> "Now, the evidence in this case introduced in behalf of the Government is simple. Two police officers testified that they received a radio call and in response to the call they went into the alley behind the rear of this store. They saw the rear door broken and hanging on a single hinge and a pane of glass smashed. This was about three o'clock in the morning. One policeman went into the store through this broken door, the other ran around to the front. There was a light on in the store, apparently the type of light that many stores keep on all night long. The police officer that went in through the rear door found two men in the store. One of them was Cunningham. He arrested Cunningham, but the other man ran away. The second policeman pursued the runaway. Other policemen arrived. They lost track of the second man after pursuing him to a particular spot. He hid in the bushes. When apparently he saw that the police were close at hand he came out of the bushes and said, I give up. And that was the defendant Flurry.
>
> "The fact that the defendant Flurry was hiding in the bushes from the police, that he ran and that he was hiding in the bushes, is not disputed by him.
>
> "Now, at this point I want to say that if you accept the testimony of the officers -- and there is no reasony why you should not, they appeared to me to be perfectly disinterested; but it is for you to say, of course -- the

> officers' testimony is sufficient, if you accept it, to constitute, without anything further proof beyond a reasonable doubt of the defendants' guilt." (Jt. App. _____)
> (Emphasis supplied)

In effect, this last paragraph of the Judge's statement says: (a) I believe the testimony of the police officers; (b) their testimony is proof beyond a reasonable doubt of the defendants' guilt, and (c) you may disbelieve their testimony but no reasonable man would.

Such a statement in a charge to the jury is clearly reversible error. In the case of United States v. Murdock, 290 U.S. 389, 78 L.ed. 381, an income tax case, a trial judge stated:

> "So far as the facts are concerned in this case, Gentlemen of the Jury, I want to instruct you that whatever the Court may say as to the facts, is only the Court's view. You are at liberty to entirely disregard it. The Court feels from the evidence in this case, that the Government has sustained the burden cast upon it by the law and has proved that this defendant is guilty in manner and form as charged beyond a reasonable doubt."

In its opinion, the Supreme Court held:

> "In the circumstances we think the trial judge erred in stating the opinion that the respondent was guilty beyond a reasonable doubt. A federal judge may analyze the evidence, comment upon it, and express his views with regard to the testimony of witnesses. He may advise the jury in respect of the facts, but the decision of issues of fact must be fairly left to the jury, Patton v. United States, 281 U.S. 276, 288, 74 L.ed. 854, 858, 50 S.Ct. 253, 70 A.L.R. 263; Quercia v. United States, 289 U.S. 466, 77 L.ed. 1321, 53 S.Ct. 698. Although the power of the judge to express an opinion as to the guilt of the defendant exists, it should be exercised

> cautiously and only in exceptional cases. Such an expression of opinion was held not to warrant a reversal where upon the undisputed and admitted facts the defendant's voluntary conduct amounted to the commission of the crime defined by the statute. Horning v. District of Columbia, 254 U.S. 135, 65 L.ed. 185, 41 S.Ct. 53." (Emphasis supplied)

Thus, the Supreme Court has held that only in exceptional cases may the trial judge impose upon the jury, while commenting on the evidence, his own view as to the guilt or innocence of the accused. It cites as an example of one of these exceptional circumstances the case from our own Court of Appeals, namely Horning v. United States. and that such a circumstance is where none of the evidence is in conflict. Our Court, in Billeci, supra, has adopted this position of the Supreme Court and limited the right of a trial judge to comment on the evidence only to such exceptional cases. See also Blunt v. United States, supra. In Billeci, it was held that although he may comment on the evidence:

> "He cannot urge his own view of the guilt or innocence of the accused . . . since . . . the accused has a right to trial by the jury. That means that his guilt or innocence must be decided by twelve laymen and not by the one judge. A judge cannot impinge upon that right any more than he can destroy it. He cannot press upon the jury the weight of his influence any more than he can eliminate the jury."

We can therefore conclude that it is the law of this jurisdiction and of the Supreme Court that a judge may not in a

charge state that he believes the defendant guilty and out of the other side of the mouth still say that they need not accept his opinions or any of his comments but it is up to them to make the decision as to the guilt or innocence of the defendant. More particularly would this be the case, as here, when the judge indicates that any opinion contrary to his would be unreasonable.

The Government may argue that the paragraph quoted above in the charge is not an indication of the Trial Judge as to the guilt or innocence of the Appellant but, rather, that it is a proper comment by the Trial Judge as to the creditibility of a witness. But, to argue this would be to completely disregard the fact situation involved. The Government's case <u>was the testimony of the police officers</u>. Since the Judge clearly indicated he believed in the Government's case, it logically follows that he disbelieved the testimony of the Defendants. In other words, he stated he believed the police officers, and he believed the Defendants were guilty. Certainly in his charge he could not say that he believed the testimony of Defendants Cunningham and Flurry were outright lies. See <u>United States</u> v. <u>Murdock</u>, <u>supra</u>, and cases cited in the Annotation beginning on page 387 of Lawyers Edition 78. Our Court has held that a trial judge may not do indirectly what he cannot do directly in situations similar to this. <u>Vinci</u> v. <u>United States</u>, (1947) 81

U.S. App. D.C. 386, 159 F.2d 777. This is exactly what the Judge did in this case.

It is reversible error. Murdock, supra; Billeci, supra; Blunt, supra; and DeSisto, supra.

III. THE TRIAL JUDGE'S INSTRUCTIONS, TAKEN AS A WHOLE, WERE ARGUMENTATIVE IN THAT THEY WERE DIRECTED ENTIRELY TOWARD A VERDICT OF GUILT AND, HENCE, ARE ERRONEOUS AND REQUIRE REVERSAL.

The Trial Judge's charge is contained in the Joint Appendix, pages ____ to _____. Although they are to be considered as cold type, a close reading of them will show that there is not one word in the Judge's instruction which in any way supports the Defendants' position in the case. On the contrary, they are replete with repeated emphasis on the position of the Government.

Appellant submits that, taken as a whole, the instructions of the Judge were directed only toward a finding of guilty. For example, when he refers to the testimony of the witnesses, he speaks at length of the fact that the Appellant had a criminal record, which he emphasizes as a conviction of "robbery, a worse crime than housebreaking," the issue to go before the jury. The wording of this charge was certainly not helpful to the Appellant. His next instruction was that of the creditibility of the policemen which, as shown in Point II, is prejudicial and reversible error. The next charge, referring to

Flurry running away, could in and of itself be held reversible error since he colored it by stating it to be a fact that Flurry "was trying to escape." It is to be noted that in this charge he quotes a specific biblical verse which was in Hickory v. United States, 160 U.S. 408, 16 S.Ct. 327, 40 L.ed. 474, when taken with added remarks, held to be prejudicial error.

A further charge was one contrasting the testimony of the police officers, those trained observers,and "disinterested witnesses" with that of the Defendants and the criminal record of Cunningham. Another charge was that of the missing witness, Donald Nelson, and a further charge in regard to Flurry's refusal to answer when asked why he broke into the store. Although Flurry, on cross examination, explained his silence, no mention is made of this by the Trial Judge. The Trial Judge merely stated, "Is that the attitude of an innocent man, you have a right to ask yourselves." Thus, only one side of the story was told. Nowhere in the charge is there any reference to the actual defense of the Appellant other than the fact of his verbal denial on the stand that he was not in the store, denied ever having been in the store, and thereason for his being in the alley and being up at thattime of the morning. On the contrary, even when reference was made to this defense of the Appellant, the Trial Judge belittled it both by his previous remark in his trial in chief, and his missing witness instruction.

He did not mention, or make any reference to, other aspects of the Appellant's defense: (a) that the extra-judicial statement attributed to the Appellant was not reduced to writing; (b) the total failure of the Government to produce any fingerprints of either Defendant, inside or outside of the store; (c) the failure of the Government to produce any tools which might have been used to force open the heavy back door of the store, and (d) other inconsistencies in the statements of the police officers. These undisputed facts in favor of the Defendants were not mentioned by the Court in its comments on the evidence and its analysis of it. Yet, each and every fact, damaging to the Defendants, was colorfully outlined by the Trial Judge and then capped off by his own opinion as to the guilt of the Defendants.

A trial judge is required to be impartial - not an advocate. His remarks or assessment of the evidence, when permissible to comment on it, should be well balanced and impartial. See Blunt and Billeci, supra. It is well established that if a trial judge comments on the evidence, he should call attention to the evidence in favor of, as well as against, the accused. Hunter v. United States (1932) CCA 5th, 62 F.2d 217. See also Cline v. United States, (1927) Cir. 57 F.2d 494, Minner v. United States, (1932) 10th Cir. 57 F.2d 506. See also cases cited in 78 L.ed., pages 398 through 404 on this point. Appellant submits this was not

done in this case.

CONCLUSION

Appellant submits that each of the three points argued on behalf of the Appellant are in and of themselves such prejudicial error that the conviction in this case should be reversed and a new trial granted. We submit that any one reading this Joint Appendix would conclude that, in these material aspects, the Trial Judge exceeded "the cold neutrality required of a trial judge."

Respectfully submitted,

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Counsel for Appellant
Appointed by the Court
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CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Appellant has, this _____ day of September, 1962, been served by hand upon the United States Attorney, United States Court House, Washington, D. C.

Martin F. O'Donoghue

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17182

ROBERT CUNNINGHAM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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QUESTION PRESENTED

In the opinion of the appellee the following question is presented:

Did the trial court deprive appellant of a fair trial by exercising its historical discretionary power to comment upon the evidence when it carefully explained to the jury that its comments were not binding upon the jury and that the jury had sole responsibility for finding the facts and determining appellant's guilt or innocence?

664025—62

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TABLE OF CASES

*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17182

ROBERT CUNNINGHAM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On September 11, 1961, a two-count indictment was filed in the District Court charging appellant with violations of 22 D.C.C. 1801 (Housebreaking) and 22 D.C.C. 2201 (Larceny). A motion for a judgment of acquittal was granted by the Court on the larceny count. On January 4, 1962, after trial by jury, appellant was found guilty on the housebreaking count. By a judgment and commitment filed on February 2, 1962, appellant was sentenced to a term of imprisonment of from twenty months to five years.

At trial, Officer Clyde Rice testified that about 3:00 a.m. on the morning of August 18, 1961, he and Officer Woyshner responded by car to a "radio run" in the 6200 block of Third Street, N.W. (Tr. 6, 7). When they arrived at the rear of a television store at 6226 Third Street, Officer Rice "observed the rear door of this building was broken open and was hanging on one hinge." (Tr. 8.) A television set and a recorder were sitting outside the rear door (Tr. 13). He "entered

through this door that was open. On the inside, as I got right through the door, I observed two males start for the front of this store and I yelled to my partner to cover the front. I entered on the further end of the store and I yelled for the two defendants to stop or I would shoot" (Tr. 8). With his gun drawn (Tr. 8), Officer Rice ordered the two men, identified as appellant and Flurry (Tr. 9, 10), to approach him (Tr. 10). "When they got right in front of me Cunningham stepped in front of me shielding me from Flurry; and at this time Flurry fled from the store" (Tr. 10). When Flurry ran through the rear door Officer Rice "yelled" for his partner and Office Woyshner pursued Flurry west on Sheridan Street (Tr. 11). At the scene, appellant refused to disclose Flurry's name to Officer Rice but admitted that he had met his accomplice at a bar on 14th Street and that they had gone to the premises on 3rd Street because the accomplice had told appellant "that he knew where he could get a little money, make a little money" (Tr. 12). Also at the scene, appellant said that they were going to hire a taxi-cab to remove the television set and the recorder (Tr. 14).

Officer Woyshner stated that immediately upon arriving at the premises, he went to the front of the television shop to cover the front door (Tr. 60). Through the front window of the store he saw "Officer Rice holding a gun on the rear of one subject. There was two of them, their backs turned towards me, as if they were heading out towards the back of the store (Tr. 60). As Officer Woyshner ran back to the rear of the premises he heard Officer Rice yell and he saw a man running across the alley (Tr. 62). The officer pursued the man over fences and through the alleys (Tr. 62). Police dogs were called and the dogs "started smelling and went to the rear of this house and into the yard, and I was out in the alley by that time and this one subject come out and said, 'I give up' " (Tr. 63). That subject was the defendant Flurry (Tr. 63, 64).

Appellant admitted to Officer Woyshner that "he had met this Flurry at a bar on 14th Street earlier in the evening and had said that—Flurry had mentioned to him let's go find someplace to get some money. And that they proceeded and was walking along, as he told me, looking for a place to break into.

And they walked along. He told me they just walked to this here place and to this location and he stated—Cunningham stated that Flurry mentioned this was a place that they were going to break into, and he stated—Cunningham stated all the time that it was Flurry's idea to do this" (Tr. 68, 69).

Phillip S. McKinney, the service manager for American Sales and Service Company, an electrical appliance store, located at 6226 Third Street, N.W. (Tr. 93), testified he had gone to the store about 3:30 a.m. on August 18, 1961 (Tr. 94), and observed the broken condition of the back door (Tr. 95). He identified the television set and the recorder as property owned by or in the custody of American Sales and Service Company (Tr. 96, 97).

In testifying, both appellant and Flurry denied having been in the television shop (Tr. 125, 144). According to their testimony, they were together on their way to visit a friend named Vernon Nelson (Tr. 114, 139) and had stopped in the alley to urinate when they were arrested by the police (Tr. 115, 140). On cross-examination appellant admitted a previous conviction for robbery (Tr. 133, 134). Flurry admitted his flight from Officer Rice (Tr. 141, 142), and further stated he remained silent when accused by the officer of being the housebreaker (Tr. 181). Vernon Nelson was not called as a witness by the defense and no explanation was given for his absence.

STATUTE INVOLVED

Title 22, District of Columbia Code, Section 1801 provides:

> Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

SUMMARY OF ARGUMENT

A federal judge may in his discretion analyze the evidence, comment upon it, and express his views with regard to the testimony of witnesses.

The court's statements challenged on this appeal were legitimate comments which had a factual basis in the evidence.

The court's charge was not argumentative. It did not usurp the jury's functions. Considered in its entirety the charge clearly and exhaustively informed the jury that the court's comments were not binding upon the jury and that the jury had sole responsibility for deciding the facts and the question of appellant's guilt or innocence. Appellant had a fair trial.

ARGUMENT

I. Appellant had a fair trial

a. The Court's comment made during defendant Flurry's testimony was proper

During the testimony of the co-defendant Flurry, the court made a brief comment to the effect that Flurry's admitted presence in the darken alley behind the store at three o'clock in the morning was a circumstance which could be considered in evaluating Flurry's testimony relating his version of the events culminating in his arrest.[1] This comment was proper and in any event not significantly prejudicial when considered in the context of the entire case.

The statement was made to Flurry and not to appellant. It was not said with any emphasis for government counsel didn't even hear the remark (Tr. 189), and neither Flurry's trial counsel nor appellant's counsel noted any objection at the time (Tr. 185, 186). It was not until the conclusion of the case and after a rebuttal witness had testified that Flurry's counsel mentioned the matter (Tr. 188). Appellant's counsel obviously did not consider the incident significant for he did not make

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[1] The Court stated to Flurry: "You ought to have been in bed. Honest people are in bed at three o'clock in the morning" (J.A. 3; Tr. 185, 186).

any objection until the following day after all the testimony was in (Tr. 198).[2]

The failure to make a timely objection forecloses appellant's reliance upon the remark as the basis for his assertion that he was denied a fair trial. Prompt objection to such matters must be made at the time in order to give the court an opportunity for correction if correction is warranted. *Fogarty* v. *United States*, 263 F. 2d 201, 204 (5th Cir. 1959), *cert. denied*, 360 U.S. 919.

The court, in its discretion, had the right to make the statement. "In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts. * * * *Vicksburg RR* v. *Putnam*, 118 U.S. 545, 553 (1886).

"Trial by jury in the courts of the United States is a trial presided over by a judge, with authority, not only to rule upon objections to evidence, and to instruct the jury upon the law, but also, when in his judgment the due administration of justice requires it, to aid the jury by explaining and commenting upon the testimony, and even giving them his opinion upon questions of fact, provided only he submits those questions to their

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[2] Appellant also complains of the court's examination of Flurry. (This examination, to which no objection was made, is at J.A. 3.) This contention is totally without merit. The examination was brief and it was beneficial rather than prejudicial to Flurry and appellant for it gave Flurry an additional opportunity to explain his testimony. As this court stated in *Griffin* v. *United States*, 83 U.S. App. D.C. 20, 22, 164 F. 2d 903, 905 (1947):

"It cannot be too often repeated, or too strongly emphasized, that the function of a federal trial judge is not that of an umpire or of a moderator at a town meeting. He sits to see that justice is done in the cases heard before him; and it is his duty to see that a case on trial is presented in such a way as to be understood by the jury, as well as by himself. *He should not hesitate to ask questions for the purpose of developing the facts;* and it is no ground of complaint that the facts so developed may hurt or help one side or the other."

determination." *United States* v. *Philadelphia RR*, 123 U.S. 113, 114 (1887). Federal judges have always been allowed greater latitude in commenting upon the evidence than state judges. *Bute* v. *United States*, 333 U.S. 640 (1948) (footnote at page 650).

The right of a trial judge in the exercise of his discretion to comment upon the evidence has always been recognized in this jurisdiction. *United States* v. *Murphy*, MacArthur & Mackey, 375, 381 (1883); *Maxey* v. *United States*, 30 App D.C. 63, 78 (1907); *Heinecke* v. *United States*, 111 U.S. App. D.C. 98, 294 F. 2d 727 (1961). In *Heinecke, supra*, a prosecution for sending obscene matter through the mails, the court stated to the jury that in its opinion the matter was actually obscene in the eyes of the law. The opinion was on the very issue upon which *Heinecke* based his defense. Nevertheless, this court, recognizing the right of a trial judge to comment upon the evidence, affirmed the conviction. The statement in the instant case was far less prejudicial than that made in *Heinecke*.

Moreover, the statement was a legitimate reference to an important circumstance which the jury should have considered. Presence on the streets at late and unusual hours is frequently considered by the courts in its determination of probable cause for an arrest. *Dixon* v. *United States*, 111 U.S. App. D.C. 305, 296 F. 2d 427 (1961); *Dickerson* v. *United States*, 120 A. 2d 588 (D.C. Mun. App. 1956).

Considered in the context in which it was made and in view of the lack of timely objection by appellant's counsel, the statement by the court cannot be deemed to have denied appellant a fair trial.

b. The Court's comment on the credibility of the officer's testimony was proper

During its charge the Court stated:

> Now, at this point I want to say that if you accept the testimony of the officers—and there is no reason why you should not, they appeared to me to be perfectly disinterested; but it is for you to say, of course—the officer's testimony is sufficient, if you accept it, to constitute without anything further, proof beyond a reasonable

> doubt of the defendant's guilt (J.A. 12). [Emphasis added.]

This statement was within the permissible range of judicial comment. The Supreme Court and this Court have held that judicial opinions upon the credibility of witnesses is proper. *Simmons* v. *United States* 142 U.S. 148 (1891); *Beck* v. *United States*, 78 U.S. App. D.C. 10, 140 F. 2d 169 (1943); *Wilson* v. *United States*, 71 U.S. App. D.C. 54, 107 F. 2d 253 (1939).

As this Court stated in *Wilson* v. *United States:*

> The right of the judge to express this opinion upon the facts includes, within the limitations stated, the right to state his opinion of the credibility of witnesses, including that of the defendant himself (quoting *Russell* v. *United States*, 12 F. 2d 683, 686), 71 U.S. App. D.C. at 55, 107 F. 2d at 255.

Moreover, the Court's comment was quickly qualified in the very sentence challenged on this appeal as an opinion which was not binding upon the jury.

c. The court did not usurp the jury's function

The court's comments did not usurp the jury's function or deprive appellant of his right to trial by jury. It is an "axiomatic" rule of construction "that the charge to the jury must be considered as a whole." *Kinard* v. *United States*, 69 App. D.C. 322, 323, 101 F. 2d 246, 247 (1938); *Askins* v. *United States*, 97 U.S. App. D.C 407, 412, 231, F. 2d 741, 746 (1956), *cert. denied*, 351 U.S. 989.

When read as a whole, the Court's charge in the instant case distinctly and emphatically left to the jury the function of determining the facts and deciding the question of appellant's guilt or innocence. At the beginning of its charge the Court articulately described the relative functions of the Court and jury (J.A. 6, 7).

> On the other hand, the jury decides the facts. You ladies and gentlemen of the jury are the sole judges of the facts and you must determine the facts yourselves on the basis of the evidence introduced at this trial.
>
> In addition to intructing the jury as to the rules of law that must govern the disposition of the case on trial, the Court has still a further function to perform. In

order to aid and assist the jury in deciding the facts the Court is authorized to summarize the evidence, to comment on the facts and on the evidence, but the Court's summary of the evidence and the Court's comments and discussion of the facts and of the evidence are not binding on you, they are intended only to help you, and you need attach to them only such weight as you deem wise and proper. If your recollection or your understanding or your view of the evidence in any respect differs from the Court's recollection or understanding or view, than it is your recollection, your understanding and your view of the evidence that must prevail because, I repeat what I said at the beginning of my remarks, the final decision on the facts is solely within your province, my instructions are binding on you only as concerns the law.

Later the Court stated (J.A. 8):

> You are the sole judges of the credibility of witnesses. I mean by that that it is for you, and for you alone, to determine whether to believe any witness, the extent to which any witnesses should be credited and the weight that should be attached to the testimony of any witness. In the case there is any conflict in the testimony it is your function to resolve the conflict and to determine what the fact was and where the truth lies.

In the very sentence of the charge which is challenged the Court reiterated his admonition that his comment was not binding on the jury and that the jury had to decide the question for itself. Finally, at the conclusion of the charge the Court again stated the admonition (J.A. 14):

> Now, all these matters you have a right to consider. And in concluding my instructions to you I want to repeat what I said at the opening of my remarks: My discussion of the evidence and my comments on the evidence and on the facts are not binding on you, they were intended only to help you. The decision on the evidence and on the facts must be your own, irrespective of any comments or observations of the Court. To decide the facts is your function and your responsibility.

Thus, the Court repeatedly and clearly told the jury that its comments were not binding upon them. The Court did not assume the role of an advocate. The charge contained nothing comparable to the coercive language—an acquittal would constitute a "flagrant disregard" of the jury's duty—which this Court criticized in *Billeci* v. *United States*,[3] 87 U.S. App. D.C. 274, 184 F. 2d 394 (1950). Rather the comments were impassionate statements quickly qualified as merely the Court's opinion.

The charge was not argumentative because it mentioned appellant's previous criminal record (J.A. 9) and the inferences which could be drawn from Flurry's admitted flight (J.A. 12), Flurry's admitted silence in the face of the policeman's accusation (J.A. 14) and the defense's failure to call Vernon Nelson as a witness or explain this absence (J.A. 14). Each of the instructions on these points had a proper factual basis in the evidence and was legally correct. If the Court's instructions on these matters were unfavorable to appellant it was only because most of the evidence adduced at trial and the inferences from them were in fact unfavorable to him.

The widely acknowledged unpredictability of jury verdicts attests to the independence of jury deliberations. The basic premise of our jury system is that jurors have sufficient understanding and intelligence to evaluate the testimony and understand and follow the Court's instructions. Jurors are presumed to follow the instructions given them by the trial court. *Delli Paoli* v. *United States*, 352 U.S. 232 at 242 (1957); *Hall* v. *United States*, 84 U.S. App. D.C. 209, 171 F 2d 347 (1948). Certainly, only a minimal level of independence, understanding and intelligence need be attributed to appellant's jurors in order to conclude that they understood that they were the sole finders

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[3] The other cases cited by appellant are similarily inapplicable on their facts. For instance, in *Quercia* v. *United States*, 289 U.S. 466 (1933), the court did not comment on the evidence but added to it his personal experience by informing the jury of his experience that people who wiped their hands while testifying were always liars. This criticism cannot be made of the instant charge. The statement that the policemen appeared disinterested was based on evidence in the case. The testimony showed that, the officers, appellant and Flurry did not know each other before the incident in question (Tr. 39, 135, 180). In *Blunt* v. *United States*, 100 U.S. App. 266, 244 F. 2d 355 (1957) the court stated its remarks not as opinions but as facts which had to be accepted by the jury.

of fact and that the Court's comments upon the evidence were not binding upon them but rather were mere personal opinions.

If the Supreme Court's and this Court's repeated assertions of the right of a trial judge in the exercise of his discretion to comment upon the evidence are to have any genuine meaning, the comments by the trial court in the instant case cannot be considered, in the context of this case, as depriving appellant of a fair trial.

CONCLUSION

Wherefore, it is respectfully submitted the judgment of the District Court be affirmed.

DAVID C. ACHESON,
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FRANK Q. NEBEKER,
DONALD S. SMITH,
WILLIAM C. WEITZEL, Jr.,
Assistant United States Attorneys.

U.S. GOVERNMENT PRINTING OFFICE: 1962

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,182

ROBERT CUNNINGHAM,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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JOINT APPENDIX

[Filed September 11, 1961]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled on June 29, 1961, Sworn in on July 5, 1961.

THE UNITED STATES OF AMERICA	Criminal No. 749-61
v.	Grand Jury No. 960-61
ROBERT CUNNINGHAM THOMAS FLURRY	Violation: 22 D.C.C. 1801, 2201 (Housebreaking and Larceny)

The Grand Jury charges:

On or about August 18, 1961, within the District of Columbia, Robert Cunningham and Thomas Flurry entered the store of Robert C. Peters, with intent to steal property of another.

SECOND COUNT:

On or about August 18, 1961, within the District of Columbia, Robert Cunningham and Thomas Flurry stole the property of, and in the custody of, Robert C. Peters, of the value of about $170.00, consisting of the following: one television set of the value of $125.00 and one record player of the value of $45.00.

/s/ DAVID C. ACHESON
Attorney of the United States in
and for the District of Columbia

A TRUE BILL:

/s/ Charles E. Sando
Foreman.

[Filed September 15, 1961]

PLEA OF DEFENDANT

On this 15th day of September, 1961, the defendants,1 - Robert Cunningham, 2 - Thomas Flurry, appearing in proper person and by their attorneys, 1 - Alan Kay, 2 - Appoint counsel to defend, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, each pleads not guilty thereto.

Copy of indictment is given to the defendant Flurry.

The defendants are remanded to the District Jail.

By direction of

/s/ ALEXANDER HOLTZOFF
Presiding Judge
Criminal Court #1

Present: United States Attorney

By Victor Caputy
Asst. United States Attorney

* * * * * *

[Filed September 6, 1962]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1

Washington, D. C.
January 2, 1962.

The above cause came on for trial before the HONORABLE ALEXANDER HOLTZOFF, United States District Judge, and a jury.

* * * * *

2 Thereupon,

THOMAS FLURRY

a Defendant, called to the witness stand on his own behalf, having been duly sworn, was examined and testified as follows:

* * * * * * * * * * *

THE COURT: How is it or why is it that you and Cunningham were out on the streets at three o'clock in the morning?

DEFENDANT FLURRY: Well, Your Honor, I was going to see Vernon Nelson.

THE COURT: At three o'clock in the morning?

DEFENDANT FLURRY: Well, sir, he gets off from work at --

THE COURT: Well, you could see him before he goes to work, couldn't you?

DEFENDANT FLURRY: Yes, sir.

THE COURT: You ought to have been in bed. Honest people are in bed at three o'clock in the morning.

* * * * *

[Filed January 3, 1962]

[Judgment of Acquittal as to Count 2 of the Indictment]

On this 3rd day of January, 1962, came the parties mentioned aforesaid, the same jury mentioned aforesaid, in manner mentioned aforesaid in this cause, the hearing of which was respited yesterday, January 2, 1962; whereupon the Court grants the defendants' motion for a judgment of acquittal as to count two of the indictment; thereupon the case is respited until the meeting of Court tomorrow morning. The defendants are remanded to the District of Columbia Jail.

By direction of

/s/ ALEXANDER HOLTZOFF
Presiding Judge
Criminal Court # 1

* * * * * *

[Filed September 6, 1962]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1

Washington, D. C.
January 3, 1962.

The above cause came on for further trial before THE HONORABLE ALEXANDER HOLTZOFF, United States District Judge, and a jury.

* * * * *

2

* * * * * *

MR. BURKE: Your Honor, with humble apologies to Your Honor, but Your Honor made the statement, while Mr. Flurry was on the stand, that honest people are in bed at this hour.

THE COURT: I did.

MR. BURKE: And I wonder if Your Honor will ask the jury to disregard that.

THE COURT: No, I never ask the jury to disregard my statements.

MR. BURKE: Wouldn't that be prejudicial against this witness: Wouldn't that be prejudicial against this witness?

THE COURT: The circumstance is prejudicial, not my statement.

MR. SMITH: I'm sorry. I didn't hear His Honor say honest --

THE COURT: I said that honest people are in bed at three o'clock in the morning. I said that.

MR. SMITH: I didn't hear that, Your Honor.

MR. BURKE: Well, Your Honor, just to protect myself, I move at this time for a mistrial.

THE COURT: You may note an objection to my remark. That is entirely proper, it is lawyer-like.

* * * * * *

3

Washington, D. C.
January 4, 1962.

* * * * *

MR. SMITH: Your Honor, I wonder if I could submit a requested instruction which I have served.

THE COURT: Yes, you may do so. Have you given a copy to the other side?

MR. SMITH: Yes, Your Honor, to both attorneys.

(Brief pause.)

THE COURT: No, I am going to deny that because the Court has a right to express its opinion as to guilt or innocence.

MR. SMITH: I wondered if Your Honor would charge the jury that this is not binding upon them.

THE COURT: I always do that. I appreciate the care that you have taken in preparing this, but it is really unnecessary labor.

4 MR. SMITH: Thank you, Your Honor.

* * * * * *

MR. O'HARA: One other thing, Your Honor. Yesterday Mr. Burke objected to the Court's questioning of the witness Flurry with regard to a person of that age being out at three a.m. in the morning. After consideration, I think that the Court's comments would also be prejudicial towards Cunningham and may I go on record as objecting with regard to Cunningham. Thank you.

THE COURT: Of course, the Court's comment was really a fact of life because honest people, except those who do night work like a policeman, don't stay out at three o'clock in the morning, unless on a night like New Years Eve or something of that sort.

MR. SMITH: Your Honor, may I file my written request in the record?

THE COURT: You may, of course.

MR. SMITH: Thank you.

* * * * * *

JURY CHARGE

THE COURT: Ladies and gentlemen of the jury: This is a simple case. The trial was short, the testimony was not extensive and not complicated, and it should not take you very long to decide this case.

Under ordinary circumstances, my remarks would be very brief
5 to you. However, it is my understanding that this is the first case in which you ladies and gentlemen have participated at this term of Court and for that reason my remarks will be considerably more extensive and more elaborate than the case intrinsically warrants, and, in fact, some of my remarks may be of aid to you in other cases that you may have occasion to participate in during your period of service as jurors.

I want to say at the outset that under the system of jury trials that prevails in the Federal courts -- and this, of course, as you know, is a Federal court -- it is the function of the Court, that is, of the Judge, it is my function and my duty, therefore, to instruct the jury as to the law applicable to the case. The jury is bound and obligated to take the law from the Court and to follow the Court's instructions as to the law.

On the other hand, the jury decides the facts. You ladies and gentlemen of the jury are the sole judges of the facts and you must determine the facts yourselves on the basis of the evidence introduced at this trial.

In addition to instructing the jury as to the rules of law that must govern the disposition of the case on trial, the Court has still a further function to perform. In order to aid and assist the jury in deciding the facts the Court is authorized to summarize the evidence, to comment on the facts and on the evidence, but the Court's summary of the evi-
6 dence and the Court's comments and discussion of the facts and of the evidence are not binding on you, they are intended only to help you, and you need attach to them only such weight as you deem wise and proper. If your recollection or your understanding or your view of the evidence in any respect differs from the Court's recollection

or understanding or view, than it is your recollection, your understanding and your view of the evidence that must prevail because, I repeat what I said at the beginning of my remarks, the final decision on the facts is solely within your province, my instructions are binding on you only as concerns the law.

There are a number of general principles of law that are applicable in trials of all criminal cases and I shall briefly summarize them to you now. First, the fact that a defendant has been indicted and is charged with a crime is not in itself an indication of guilt because an indictment is merely the procedure and the machinery by which a defendant is brought before the Court and is placed on trial.

Second, every defendant, when he comes into court in a criminal case, is presumed to be innocent and this presumption of innocence attaches to him throughout the trial.

Third, the burden of proof is on the Government to prove the defendant's guilt beyond a reasonable doubt. Unless the Government sustains this burden and proves beyond a reasonable doubt that the defendant

7 has committed every element of the offense with which he is charged, the jury must find him not guilty.

Now, the reason for these rules -- and they are basic rules in our law and in our American traditional way of administering justice -- is to make certain that we do not by some mistake convict an innocent person.

Now let me go back. I said a moment ago that the burden is on the Government to prove a defendant's guilt beyond a reasonable doubt. Now, what is meant by proof beyond a reasonable doubt? It does not mean proof beyond all doubt whatsoever; it means proof to a moral certainty and not necessarily proof to an absolute or mathematical certainty. By a reasonable doubt, as its very name implies, is meant a doubt based on reason and not just some whimsical speculation or some capricious conjecture.

Let me explain the meaning of the words proof beyond a reason-

able doubt in simple every-day words. Proof beyond a reasonable doubt simply means this: If after an impartial comparison and consideration of all the evidence you can say to yourself that you are not satisfied with the defendant's guilt, then you have a reasonable doubt. But, on the other hand, if after such impartial comparison and consideration of all the evidence you can truthfully and candidly say to yourself that you have an abiding conviction of the defendant's guilt, such as you

8 would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt.

In other words, proof beyond a reasonable doubt is such proof as will result in an abiding conviction of the defendant's guilt on your part, such a conviction as you would be willing to act upon in the more weighty and important matters relating to your own affairs.

In determining whether the Government has established the charge against the defendants you will consider and weigh the testimony of all the witnesses who have testified at this trial, as well as the circumstances concerning which testimony has been introduced. Circumstances frequently cast an illuminating light on oral testimony.

You are the sole judges of the credibility of witnesses. I mean by that that it is for you, and for you alone, to determine whether to believe any witness, the extent to which any witness should be credited and the weight that should be attached to the testimony of any witness. In case there is any conflict in the testimony it is your function to resolve the conflict and to determine what the fact was and where the truth lies.

In reaching a conclusion as to the credibility of any witness and in weighing the testimony of any witness you have a right to consider any matter that seems to you to have a bearing on the question. For

9 example, you have a right to consider the attitude and the demeanor of the witness on the witness stand, the witness' manner of testifying, whether the witness impressed you as a truth-telling individual, whether the witness was a trained observer, whether the witness impressed you as having an accurate memory and recollection,

whether the witness has any motive for not telling the truth, whether the witness had full opportunity to observe the matters concerning which he has testified, and whether the witness has any interest in the outcome of this case.

If you find that any witness -- and that includes the defendants, who took the witness stand -- wilfully testified falsely as to any material fact concerning which the witness could not have possibly be mistaken, you are then at liberty, if you deem it wise to do so, to disregard the entire testimony of such witness or any part of such witness' testimony.

In connection with weighing the testimony of the witnesses I want to say a word about the defendant Robert Cunningham, who took the witness stand and testified. It appeared on his cross-examination that he has a criminal record, that at one time he was convicted of housebreaking on a previous occasion -- no, it was robbery, not housebreaking. Well, robbery is a worse crime than housebreaking. Now, the fact that a defendant has a criminal record has no bearing on the question of his guilt or innocence of the charges on which he is being tried.

10 Such charges must be proven independently of his past record. But the law admits in evidence the criminal record of any witness, be that witness a defendant or anyone else, and the criminal record of a witness is admitted under the law for the purpose of assisting the jury in determining whether or not to believe the witness. Consequently, you have a right to consider the criminal record of the defendant Cunningham for the purpose and as a help in determining whether he was a trustworthy witness when he took the witness stand and whether his testimony should be believed. You have a right, if you choose to do so, to come to the conclusion that a person with a criminal record such as Cunningham has is not entitled to the same trustworthiness, the same credance as a person whose record is unblemished.

With these preliminary remarks I come to the specific charges involved in this case. There are two defendants in this case, as you know, Robert Cunningham and Thomas Flurry. The indictment consists

of two counts, the first charging housebreaking, the second charging larceny. The specific charge is that early in the morning of August 18, 1961, prior to three a.m., the two defendants entered a store at 6226 - Third Street, Northwest, in this City, with intent to steal property. The second count charges larceny, namely, that they stole a television set and a record player out of the store on that occasion.

11 The case is being submitted to you only on the first count, housebreaking, and you will find a verdict only on the first count as to each of the two defendants separately. In other words, you will bring in a verdict on the first count as to the defendant Robert Cunningham and a separate verdict as to the defendant Thomas Flurry and in each case your verdict should be guilty or not guilty. You will ignore the second count because the Court has ruled that there is not sufficient proof that these defendants actually stole the television set and the record player.

Now, you have heard statements by counsel for the defendant Flurry, as well as possibly by other counsel, that Flurry is a juvenile, that he is seventeen years old, and of course you may be wondering why he is being tried in this Court instead of in the Juvenile Court, and you have a right to be informed instead of being kept in the dark. Under the law of the District of Columbia, ordinarily any person under eighteen years of age who is accused of a criminal offense is tried in the Juvenile Court. However, in the case of any juvenile between the ages of sixteen and eighteen, if the charge is a serious one, that is, a felony, the Juvenile Court has a right to transfer the case to this Court or, to use the technical term of the law, the Juvenile Court has a right to waive jurisdiction to this Court, and that is what happened in this case and that is why the defendant Flurry is being tried with his co-defendant

12 Cunningham in this Court at this time.

As I said before, your verdict must be either guilty or not guilty. You must arrive at your verdict objectively, impartially, deliberately, and calmly, without any feeling or emotion of any kind, without any anger on one side or sympathy on the other. You must decide the case

solely on the evidence. You must not be swayed by eloquence or influenced by oratory of counsel. You must consider only those matters that appeal to your intellect, to your mind, and you must do so impartially.

Now, the specific charge against the defendants, as I said to you, is that they entered into this store, a television store and repair shop, on the night or early in the morning of August 18th, and the charge is housebreaking, as it is known in the law.

Now, housebreaking is defined in the statutes of the District of Columbia very simply, and I shall read to you the pertinent parts of that definition:

> Whoever shall, either in the night or in the daytime, break and enter or enter without breaking any dwelling, store, warehouse, shop, or other building, with intent to commit any criminal offense, shall be punished by the penalty prescribed by law.

Now, I want to emphasize that under this definition even if a defendant enters a building without breaking into it, if the door is open

13 and he enters it, he is nevertheless guilty of housebreaking if at the time that he enters the building he intends to commit a crime within the building that he is entering. Consequently, it makes no difference whether these defendants broke the door. The testimony is that the rear door was broken. It makes no difference whether the defendants broke the door or whether the door had been broken previously by somebody else and they walked in. In either event, they are guilty of housebreaking if at the time of entry they intended to commit a crime within the building that they were entering.

Now, of course, intent ordinarily cannot be proven directly because there is no way of fathoming or delving or scrutinizing the operations of the human mind. Intent may be deduced from circumstances, from things done, things said, and from the surrounding circumstances.

Now, the evidence in this case introduced in behalf of the Government is simple. Two police officers testified that they received a radio

call and in response to the call they went into the alley behind the rear of this store. They saw the rear door broken and hanging on a single hinge and a pane of glass smashed. This was about three o'clock in the morning. One policeman went into the store through this broken door, the other ran around to the front. There was a light on in the store, apparently the type of light that many stores keep on all night long. The police officer that went in through the rear door found two men in
14 the store. One of them was Cunningham. He arrested Cunningham, but the other man ran away. The second policeman pursued the runaway. Other policemen arrived. They lost track of the second man after pursuing him to a particular spot. He hid in the bushes. When apparently he saw that the police were close at hand he came out of the bushes and said, I give up. And that was the defendant Flurry.

The fact that the defendant Flurry was hiding in the bushes from the police, that he ran and that he was hiding in the bushes, is not disputed by him.

Now, at this point I want to say that if you accept the testimony of the officers -- and there is no reason why you should not, they appeared to me to be perfectly disinterested; but it is for you to say, of course -- the officers' testimony is sufficient, if you accept it, to constitute, without anything further, proof beyond a reasonable doubt of the defendants' guilt.

The fact that the defendant Flurry ran away and tried to escape is a significant circumstance that the law permits you to consider. The law is that you have a right, if you choose to do so, to consider the fact that the accused fled from the scene as an indication of consciousness of guilt. That rule, of course, is based on the Bible, for some of you may remember in the Book of Proverbs the verse: The wicked
15 flee when no man pursueth.

But there is more than this testimony that is introduced in behalf of the Government. The defendant Cunningham, according to one of the officers, made a statement to the officer when he was being questioned. He said that Flurry and he met at the bar on Fourteenth Street,

that Flurry had said to him, Let us go someplace to get some money, and he admitted that he and Flurry had broken in and entered this store. Now, this confession may be considered by you as against the defendant Cunningham; it cannot be considered by you as against the defendant Flurry because nobody can confess for anyone but for himself. No one can confess for somebody else.

Now, it is necessary to consider the evidence introduced by the defendants. The defendants deny that they entered the store or that they were in it at any time at all, and the defendant Cunningham denies that he made the statements which the police attribute to him. Both defendants claim that when the police arrived they were not inside the store but that they were in the alley and that they had entered the alley because one of them desired to answer the call of nature.

Well, it is for you to determine whether to believe the police officers or to believe the defendants, and in determining that issue you have a right to consider the fact that presumably the police are trained observers and there is no indication that they were otherwise than disinterested in this case; while the defendants, naturally, have an

16 interest, and one of them, at least, Cunningham, has a criminal record, a conviction of a robbery.

Now, they gave an explanation as to how and why they happened to be in the neighborhood at three o'clock in the morning. Their explanation was that they were about to visit a friend of theirs by the name of Donald Nelson, who live nearby this alley, at, I believe they said, 515 Sheridan Street. They said that the reason they went to visit Nelson or intended to visit Nelson at this strange hour in the morning was that Nelson had a job at which he worked on a shift from four o'clock in the afternoon until half-past one or two in the morning and that they thought that therefore he would be back home from his work at the time they would arrive, and they also said that Nelson had extended to them a general invitation to call to see him some time.

Now, Donald Nelson, according to the defendants, is a friend or

was a friend of theirs. However, they did not call him as a witness to corroborate their story and gave no explanation for not doing so.

It is a rule of law that if a witness who is peculiarly available to one party or the other is not produced, then the jury has a right, if it wishes to do so, to draw the inference that the testimony of that witness would be unfavorable to the party that has failed to call the witness, unless the absence of the witness is sufficiently accounted for or explained.

17 Consequently, you have a right, if you choose to do so, to infer that Nelson would not have corroborated these defendants and would not have supported their explanation if he had been called.

Now, Flurry, as does Cunningham, denies that he participated in this crime and, yet, he says that when he was arrested one of the police officers asked him why he broke into the store and he, Flurry, did not answer. Is that the attitude of an innocent man, you have a right to ask yourselves? He did not deny his guilt to the officer, but just kept still.

Now, all these matters you have a right to consider. And in concluding my instructions to you I want to repeat what I said at the opening of my remarks: My discussion of the evidence and my comments on the evidence and on the facts are not binding on you, they were intended only to help you. The decision on the evidence and on the facts must be your own, irrespective of any comments or observations of the Court. To decide the facts is your function and your responsibility.

In conclusion, may I say to you that you must consider this matter from the same practical approach, the same practical common sense and the same practical intelligence which you would employ in determining any other important matter that you have occasion to decide in the course of your everyday life. This is a practical matter.

18 As I said to you before, you will consider only the first count of the indictment and ignore the second count. You will render two verdicts, two separate verdicts, one as to the defendant Robert Cunningham and the other as to the defendant Thomas Flurry, and in each instance your

verdict should be either guilty or not guilty; and as of course you are aware, your verdict must be reached by unanimous vote.

Are there any objections or suggestions? If so, you may come to the bench.

(AT THE BENCH)

THE COURT: Do you have anything, Mr. Smith?

MR. SMITH: I do not, Your Honor.

THE COURT: Mr. O'Hara?

MR. O'HARA: Your Honor, it's my feeling that throughout the instructions there were certain comments made --

THE COURT: Beg pardon?

MR. O'HARA: Throughout the instructions there were certain comments made which might be prejudicial to Cunningham.

THE COURT: Certainly. Comments are always prejudicial to one side or the other. You know, even a proper comment may be prejudicial. So, the mere fact that a comment is prejudicial does not make it erroneous. You mean that it was an erroneous comment.

19 MR. O'HARA: Erroneous in the sense that there might be derived some prejudice towards the defendant. Perhaps if I specify --

THE COURT: I have a right to comment on the evidence. Too many members of this Bar don't know anything about the common law powers of the Judge. Proceed.

MR. O' HARA: More specifically, Your Honor, your comment with regard to robbery is, it is a worse crime than housebreaking; number one.

THE COURT: Of course it is a worse crime than housebreaking.

MR. O'HARA: Number two, withregard to the testimony of the police officer, you stated, If you should believe the testimony of the police officer andthere is no reason why you should not. I want to make those two points.

THE COURT: I have a right to say to the jury that in my opinion so and so was telling the truth. I haven't gone quite that far, but the law permits that.

MR. BURKE: Your Honor, I want to adopt Mr. O'Hara's objection in behalf of the defendant Flurry.

THE COURT: Very well, you may do so.

MR. BURKE: And I also want to ask Your Honor to state to the jury that Cunningham's criminal record should not be held against Flurry.

THE COURT: No.

MR. BURKE: And --

THE COURT: I have already expatiated sufficiently on Cunningham's criminal record.

MR. BURKE: When Your Honor remarked, with regard to Flurry, that when an officer asked him why he broke in he did not answer, Is that the action of an innocent man? I want to remind Your Honor that Flurry, in his testimony, had stated that he did not answer because preliminarily the officer was being abusive to him and that's why he did not answer.

THE COURT: No, he didn't say that.

MR. BURKE: He said the officer grabbed him by his --

THE COURT: Anyway, that would not be a reason for not answering. He just kept still.

MR. BURKE: I merely want to object, Your Honor.

THE COURT: Very well.

* * * * * *

REPORTER'S CERTIFICATE

[Filed January 4, 1962]

GOVERNMENT'S REQUESTED INSTRUCTION

Ladies and gentlemen of the jury, as you may already know, it is the function of the Court, that is, it is my function and my duty, to instruct the jury as to the rules of law that must govern the disposition

of the case on trial. You, ladies and gentlemen of the jury are bound and obligated to take the law from the Court and to follow the Court's instructions as to the law. On the other hand, the jury decides the facts. You, ladies and gentlemen of the jury are the sole judges of the facts and you must determine the facts yourselves on the basis of the evidence and solely on the basis of the evidence introduced at this trial.

Now, if perchance, during the course of this trial, the Court made any statement about the case or the testimony of any witness, you are not to regard this statement as an expression by the Court of the guilt or innocence of either defendant. Nor are you to regard such a statement as an expression by the Court as to the credibility of any witness.

It is not within the province of the Court to determine the guilt or innocence of the defendants. Nor is it within the province of the Court to judge the credibility of the witnesses.

These are matters which you the jury must determine. Therefore, in deciding the issues in this case, you are instructed to disregard any statements the Court may have made during the course of the trial. No!! Heinecke v. United States, U.S. App. D.C., 294 F. 2d 727, cert. denied, U.S.

/s/ DAVID C. ACHESON
United States Attorney

/s/ DONALD S. SMITH
Asst. United States Attorney

[Denied]

[Filed January 4, 1962]

VERDICT

On this 4th day of January, 1962, came again the parties mentioned aforesaid, in manner mentioned aforesaid, and the same jury mentioned aforesaid in this cause, the hearing of which was respited yesterday, January 3, 1962; whereupon the alternate jurors are discharged and the jury retires to consider its verdict; thereupon the jurors

return into Court, and, upon their oath, say the defendants are guilty on count one of the indictment. The cases are referred to the Probation Officer of the Court and the defendants are remanded to the District of Columbia Jail.

By direction of

ALEXANDER HOLTZOFF
Presiding Judge
Criminal Court #1

* * *

* * *

[Filed February 2, 1962]

UNITED STATES OF AMERICA)
v.) Criminal No. 749-61
ROBERT CUNNINGHAM)

JUDGMENT AND COMMITMENT

On this 2nd day of February, 1962, came the attorney for the government and the defendant appeared in person and by his attorney, William O'Hara, Esquire:

IT IS ADJUDGED that the defendant has been convicted upon his plea of Not Guilty and verdict of Guilty of the offense of Housebreaking as charged in Count One and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Twenty (20) Months to Five (5) Years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

2163 7 97

/s/ ALEXANDER HOLTZOFF
United States District Judge